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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARY D. PELLEGRINO, ET AL., *Appellants*,

vs.

WILLIAM A. O'NEILL, ET AL., *Appellees*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CONNECTICUT

JURISDICTIONAL STATEMENT

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August 10, 1984

QUESTION PRESENTED

Is a claim justiciable that, because of the delays in reaching trial in civil jury cases in the major state courthouses in Connecticut, the inadequate financing of the state's judicial system violates due process of law?

PARTIES TO THE CASE

The Plaintiffs are all litigants in other state court civil jury cases in Connecticut. Their names are: Mary D. Pellegrino, Cornelius Cotton, Sr., Michael Tamburri, Jessica Tamburri, Lillian Lowell, Dawn Guerrera, Salvatore Guerrera, Shirley Driscoll, John M. Kroeton, Joseph D. Cohen, Anne Kearney, David Maffuid, Joseph De Lawrence and Donald Thibodeau.

The Defendants are all state officials in some way connected to the financing of the state judicial system. Their names are: William A. O'Neill, Governor of the State of Connecticut, Edward Caldwell, Comptroller of the State of Connecticut, Maurice J. Sponzo, Chief Court Administrator of the Connecticut Judicial Department, Irving J. Stolberg, Speaker of the Connecticut House of Representatives and Joseph J. Fauliso, Lieutenant Governor of the State of Connecticut and presiding officer of the Connecticut Senate.

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The opinion of the Connecticut Supreme Court is reported as *Pellegrino v. O'Neill*, 193 Conn. 670, A.2d (1984). The opinion of the Connecticut Superior Court is unreported.

JURISDICTION

(i) This appeal is from a final judgment of the Connecticut Supreme Court holding that the state financing of the Connecticut judicial system is not unconstitutional under the due process clause of the Fourteenth Amendment of the United States Constitution.

(ii) The judgment of the Connecticut Supreme Court was entered on July 17, 1984.

(iii) Jurisdiction is invoked pursuant to 28 U.S.C. §1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, §1:

> ". . . [N]or shall any State deprive any person of life, liberty or property, without due process of law; . . ."

The appellants' claim is that the general system of financing the state judicial system is unconstitutional. Their claim is not directed against a specific Connecticut statute.

STATEMENT OF THE CASE

This case requests a declaratory judgment that, because of the delays in reaching trial in civil jury cases in the four major courthouses of the state, the financing of the state's judicial system is unconstitutional under the due process clauses of the state and federal constitution and another provision of the state constitution.

Each Plaintiff has a civil case pending jury trial for up to eight years in either Hartford, New Haven, Bridgeport or Stamford. The Plaintiffs allege that the average length of time between the filing of a civil jury case and its disposition by judgment following a trial is 4 years, 9 months in Bridge-

port, 5 years in Hartford, 5 years, 1 month in Stamford, and 5 years, 9 months in New Haven. The Plaintiffs further allege that no other judicial district in the entire country has an average delay in any type of case equal to or longer than the averages alleged in Connecticut. The original Defendants are the Governor, the Treasurer and the Comptroller. On permission of the Superior Court, the Speaker of the House, the President of the Senate, and the Chief Court Administrator were added as Defendants.

The Defendants moved to dismiss the case on two grounds, one of which was that the state and federal constitutional claims raised by the Plaintiffs were nonjusticiable. The Superior Court agreed and dismissed the case.

On appeal, the Connecticut Supreme Court affirmed , 3-2, on both the state and federal constitutional issues on the ground of nonjusticiability. The federal due process question raised by the Plaintiffs was specifically noted and disposed of, 193 Conn. 670, 671, and note 3 (app. 3a).

SUBSTANTIAL QUESTION

This case raises an important issue of justiciability not heretofore decided by this Court: Whether a challenge to the financing of a state's judicial system is justiciable. The issue on the merits is timely because of the importance of the issue of court delays today and the interrelationship of finances to other factors in such delays. This is an appropriate case on which to test that issue because Connecticut has the worst civil jury trial delays in the country. This is also an appropriate case for review because it is here on a pure issue of law; the case was dismissed on the complaint. Thus, as in *Baker v. Carr*, 369 U.S. 186 (1962), there are at this time no disputed factual questions to muddy the legal waters. Finally this case involves the least intrusive federal involvement in the operation of state courts. If this Court finds the issue justiciable, the matter will be litigated on the merits in Connecticut's own courts, not in the lower federal courts.

The principal opinion of the Connecticut Supreme Court interpreted the complaint "to seek an increase in the number of judges available . . .", 193 Conn. 670, 684 (app. 16a). As

that Court noted, 193 Conn. at 674 (app. 6a), the Plaintiffs' complaint was not so narrow at all (the complaint in issue is printed at app. 38a). That Court apparently so construed the complaint because it felt that it already had "inherent power to direct other governmental agencies to provide such funds as may be necessary for the reasonably efficient operation of the courts." 193 Conn. at 675 (app. 7a). Therefore, according to that Court, the Plaintiffs' complaint in that regard "is virtually an academic question." 193 Conn. at 678 (app. 10a). Why that should follow is difficult for the Plaintiffs to understand. The fact that the Courts have power to do something suo motu ought not to deprive a private party of the right to claim that the power should be exercised.

The Court also notes that the Plaintiffs are not entitled to a jury trial in the state courts as a matter of federal constitutional law. 193 Conn. at 671-72, note 3 (app. 3a-4a). The Plaintiffs are making no such federal claim; their claim is that, whatever civil trial procedure the state elects to afford the Plaintiffs, the state cannot force them to wait five years or so to be heard.

It is the relationship between the judiciary and coordinate branches of government that gives rise to the "political question." *Baker v. Carr*, 369 U.S. 186, 210 (1962). As *Baker* states, 369 U.S. at 217:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Applying this language, *Baker* found justiciable a claim that state legislative malapportionment violated the Fourteenth Amendment. *Powell v. McCormack*, 395 U.S. 486

(1969), citing *Baker*, held that the Courts could determine whether the Plaintiff was illegally excluded from the House of Representatives even though the constitutional provision in point arguably gave the House sole power to determine the qualifications of its members. More recently, *Immigration and Naturalization Service v. Chadha*, U.S , 103 S.Ct. 2764 (1983), held that Congress's authority under the Naturalization Clause does not make a challenge to a one-house veto nonjusticiable.

Baker discusses in detail the areas in which nonjusticiability claims are strongest. They concern foreign relations, 369 U.S. at 211-13; dates of duration of hostilities; *Id.* at 213-14; validity of the enacting process of legislation; *Id.* at 214-15; status of Indian tribes; *Id.* at 215-17; and whether a state has the republican form of government; *Id.* at 218-26; *Luther v. Borden*, 7 How. 1 (1849). Summarizing these areas, *Baker* points out that a Court's deciding whether a state legislature is malapportioned does not "risk embarrassment of our government abroad or grave disturbance at home," nor does it "ask the Court to enter upon policy determinations for which judicially manageable standards are lacking." 369 U.S. at 226.

Pellegrino seems philosophically inconsistent with *Baker*, *Powell* and *Chadha*. The Connecticut Supreme Court's philosophy, as seen in its reference, 193 Conn. at 679, to *Colegrove v. Green*, 328 U.S. 549 (1946), is more consonant with Justice Frankfurter's dissent in *Baker v. Carr*, 369 U.S. at 266. As his dissent points out, 369 U.S. at 277, *Baker* effectively overruled his opinion in *Colegrove*.

The dissenting opinion in *Pellegrino* notes that "novel and complex constitutional questions" are raised by the Plaintiffs and that there is a "delicacy of the political balances that are at stake in the resolution of the question of justiciability; *Immigration and Naturalization Service v. Chadha*, U.S. , 103 S.Ct. 2764, 2778-80, 77 L.Ed.2d 317 (1983) . . ." 193 Conn. at 692 (app. 24a) (Peters, J., dissenting). The Plaintiffs agree with these statements. This case raises substantial and timely constitutional questions deserving of plenary consideration by this Court.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

PLAINTIFFS MARY D. PELLEGRINO, ET AL.

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APPENDIX

(i) Opinion of the Connecticut Supreme Court

MARY D. PELLEGRINO ET AL. *v.*
WILLIAM A. O'NEILL ET AL.
(12369)

PETERS, HEALEY, PARSKEY, SHEA and GRILLO, Js.

The plaintiffs herein, each of whom was a plaintiff in another civil action pending in the Superior Court, sought, inter alia, a declaratory judgment determining that the financing of the Connecticut judicial system is unconstitutional because of delays in the trial of civil jury cases in the judicial districts of Hartford, New Haven, Bridgeport and Stamford. They claimed that as a result of those delays they were deprived of their right to the administration of justice without delay, as guaranteed by the Connecticut constitution, and of their right to due process of law, as guaranteed by both the Connecticut and the United States constitutions. The trial court, on motions by the defendants, the governor, the state treasurer, the state comptroller, the chief court administrator, the speaker of the state House of Representatives and the president of the state Senate, dismissed the complaint as nonjusticiable, it concluding that the issue of the adequacy of appropriations for the courts was a political question which could not be adjudicated by judicial authority without violating the principle of separation of powers. The plaintiffs then appealed to this court. Because the complaint could be construed to question the adequacy of the number of judges appointed to the Superior Court by the legislature, and because an increase in the number of judges is a remedy which can be achieved only through legislative action, the trial court did not err in dismissing the complaint.

(Two judges dissenting)

Inherent power of the judicial branch to fund its operations, discussed.

Argued March 2—decision released July 17, 1984

Action for a declaratory judgment determining that the financing provided for the state judicial system is unconstitutional because of congestion and long delays in reaching trial in civil jury cases in certain judicial districts, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford and tried to the court, *Ripley, J.*; judgment dismissing the action, from which the plaintiffs appealed to this court. *No error.*

Wesley W. Horton, with whom was *Robert M. Shields, Jr.*, for the appellants (plaintiffs).

Elliot F. Gerson, deputy attorney general, with whom were *Henry S. Cohn*, assistant attorney general, and, on the brief, *Joseph I. Lieberman*, attorney general, for the appellees (defendants).

SHEA, J. The principal issue ultimately involved in this case is whether the judiciary, in order to implement the constitutional right to justice without delay in the disposition of civil jury cases, may direct the legislature to appoint additional trial judges for that purpose. We conclude that to do so would violate the basic principle of separation of powers and that the issue of whether a violation of that constitutional right is occurring in this state is nonjusticiable.

The plaintiffs have appealed from the dismissal of their complaint in which they claim that inadequate financing of the state judicial system has produced a backlog of civil jury cases in the judicial districts of Hartford, New Haven, Bridgeport and Stamford, which has resulted in a deprivation of their rights both to the administration of justice without delay, as guaranteed by article first, § 10[1] of our Connecticut constitution and to due process of law, as provided both in our state[2] and federal constitutions.[3] In rendering judgment the

[1] Article first, § 10 of the Connecticut Constitution provides: "All courts shall be open, and every person, for an injury done him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

[2] Article first, § 8 of our state constitution provides in part as follows: "No person shall . . . be deprived of life, liberty or property without due process of law . . . ."

[3] Article fourteen, § 1 of our federal constitution provides in part as follows: "nor shall any State deprive any person of life, liberty or property, without due process of law . . . ."

The plaintiffs have not argued their federal due process claim on any basis different from their state constitutional claims. We note that the right to

trial court concluded that the question of whether the state's financing of the judicial system violated the plaintiffs' constitutional rights because of delay in the disposition of their cases was nonjusticiable. The defendants, in accordance with Practice Book § 3012, have presented for review as an alternate ground for affirming the judgment, their defense of sovereign immunity, which the trial court also considered but rejected.

Because this appeal is from the dismissal of a complaint we must rely wholly upon the facts alleged therein.[4] Each of the thirteen plaintiffs is also a plaintiff in another action pending on the civil jury docket of the Superior Court of the judicial districts of Hartford, New Haven, Bridgeport or Stamford, for periods ranging from approximately six years and eight months to one year and ten months prior to the filing of the complaint on August 26, 1983. The defendants are the governor of the state, the treasurer, the comptroller, the chief court administrator, the speaker of the House of Representatives and the president of the Senate.

The complaint alleges that during the period July 1, 1982 through April 30, 1983, the average time consumed between the filing of a civil jury case and its disposition by judgment after trial varied from five years,

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a civil jury trial in a state court has not been deemed so fundamental that it qualifies for protection under the fourteenth amendment to the United States constitution. *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden Co.*, 284 U.S. 151, 158, 52 S. Ct. 69, 76 L. Ed. 214 (1931).

[4] A motion to dismiss pursuant to Practice Book § 142 may perform the role of either a motion to erase or a plea in abatement under our former practice. See *American Laundry Machinery, Inc.* v. *State*, 190 Conn. 212, 217, 459 A.2d 1031 (1983). Since no affidavits of facts not apparent on the record have been filed in accordance with Practice Book § 143, this motion to dismiss, like a motion to erase, "admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." *Perrys, Inc.* v. *Waterbury Redevelopment Agency*, 157 Conn. 122, 124, 249 A.2d 256 (1968); *Fairfield Lumber & Supply Co.* v. *Herman*, 139 Conn. 141, 144, 90 A.2d 884 (1952).

nine months and five days in New Haven to four years, nine months and nine days in Bridgeport. The plaintiffs claim further that these delays exceed those to be found anywhere else in this country; that the number of full-time Superior Court judges available for trials in this state is among the very lowest in relation to population of forty-two states with which a comparison has been made; that the per capita income of the 3,153,000 residents of this state was second highest in the nation, but that we rank third from last in expenditures for the judicial department as a percentage of personal income; that the sum appropriated for the operation of the judicial department in the 1982 fiscal year, $49,413,846, was inadequate for the purpose of providing citizens of this state with adequate means of redress for their civil claims without delay.

The prayer for relief seeks a declaratory judgment that the financing of the state judicial system in Connecticut is unconstitutional under our state and federal constitutions because of the delays in the trial of civil jury cases in Hartford, New Haven, Bridgeport and Stamford. Ancillary injunctive or other equitable relief needed to enforce such a declaratory judgment is also requested.

The defendants' motion raised both sovereign immunity and nonjusticiability of the questions presented by the complaint as grounds for dismissal of the action. The trial court, having concluded that the defense of sovereign immunity was inapplicable, relied wholly upon nonjusticiability in granting the motion. Since we agree that the motion was properly granted upon that ground, it is unnecessary for us to consider the question of sovereign immunity.

The trial court granted the motion to dismiss upon the ground that the case was nonjusticiable, i.e., not capable of resolution on the merits by judicial action.

"Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . ; (2) that the interests of the parties be adverse . . . ; (3) that the matter in controversy be capable of being adjudicated by judicial power . . . ; and (4) that the determination of the controversy will result in practical relief to the complainant." *State* v. *Nardini*, 187 Conn. 109, 111–12, 455 A.2d 304 (1982). The defendants have made no claim that the case does not meet the first and second of these requirements for justiciability, actuality of the controversy or adversity of the interests of the parties. They maintain that the third and fourth of these criteria are not satisfied, and the trial court agreed, concluding that the issue of the adequacy of appropriations for the courts was a political question which could not be adjudicated by judicial authority without violating the principle of separation of powers.

The question as framed by the plaintiffs for adjudication by declaratory judgment in this case is whether "the financing of the state judicial system in Connecticut is unconstitutional . . . because of the delays in reaching trial in civil jury cases in Hartford, New Haven, Bridgeport and Stamford." Before the justiciability of this issue is addressed, it is necessary to understand the statutory and constitutional structure underlying the availability of funds for the operation of the judicial department. That department, like other budgeted state agencies, is required to submit annually to designated officials of the executive and legislative branches detailed estimates of anticipated expenditures and revenues for the next fiscal year. General Statutes §§ 4-69 (11), 4-77. These estimates are transmitted in the form of a tentative budget by the secretary of the office of policy and management to the governor. General Statutes § 4-79. After a series of hearings upon the tentative budget, the figures submitted by the agen-

cies may be revised by the governor and incorporated into his proposed budget which is transmitted to the General Assembly. General Statutes §§ 4-80, 4-71. Legislative committees hold hearings on various aspects of the governor's budget proposal, which is published and distributed as a public document. General Statutes §§ 4-76, 4-75. Ultimately the General Assembly must enact appropriation and revenue bills to provide the funds deemed necessary for operation of the state government for the ensuing fiscal year. General Statutes § 4-74. A criminal penalty is provided for any agent of the state who wilfully authorizes or contracts for an expenditure in excess of the amount specifically appropriated by the General Assembly for a particular purpose. General Statutes § 4-100.

"In the establishment of three distinct departments of government the Constitution, by necessary implication, prescribes those limitations and imposes those duties which are essential to the independence of each and to the performance by each of the powers of which it is made the depositary." *McGovern* v. *Mitchell,* 78 Conn. 536, 547, 63 A. 433 (1906). The principle has been widely recognized that the judiciary, as an independent branch of government, has inherent power to direct other governmental agencies to provide such funds as may be necessary for the reasonably efficient operation of the courts. See, e.g., *O'Coin's, Inc.* v. *Treasurer of the County of Worcester,* 362 Mass. 507, 287 N.E.2d 608 (1972); *Commonwealth ex rel. Carroll* v. *Tate,* 442 Pa. 45, 274 A.2d 193, cert. denied, 402 U.S. 974, 91 S. Ct. 1665, 29 L. Ed. 2d 138 (1971); *Zylstra* v. *Piva,* 85 Wash. 2d 743, 539 P.2d 823 (1975); cf. *Ex Parte Peterson,* 253 U.S. 300, 312, 40 S. Ct. 543, 64 L. Ed. 919 (1920); see generally note, "The Courts' Inherent Power To Compel Legislative Funding of Judicial Functions," 81 Mich. L. Rev. 1687 (1983); note, 59 A.L.R. 3d 569 (1974). The duty imposed upon the courts to pro-

vide a constitutionally adequate system of justice capable of securing the rights and liberties of the people cannot be thwarted by a refusal of the legislature to appropriate funds necessary for that purpose. "In the absence of a special appropriation the existence of a law requiring an expenditure to be incurred is an appropriation of money for that purpose, and the law imposes on the comptroller the duty of settling and adjusting demands against the state for such expenses." *State* v. *Staub*, 61 Conn. 553, 563, 23 A. 924 (1892). A fortiori, the constitutional obligations to provide justice without undue delay and to afford due process of law must be taken to empower the courts charged with that responsibility to have access to the state treasury in an emergency for any funds reasonably necessary for that purpose.

Legislative recognition of the inherent power of the judicial branch to operate an effective system of justice in this state may be found in several statutes. General Statutes § 51-51v authorizes the judges of the Superior Court to appoint clerks as well as such administrative and clerical assistants as the business of the court requires. The state is required to provide such suitable quarters and furniture as are necessary for holding court when there is no suitable location available and to bear the expense thereof, including "whatever other apparatus and supplies are deemed necessary or advisable for the expeditious conduct . . . of the courts." General Statutes § 51-27 (a). General Statutes § 51-27b mandates that "[t]here shall be sufficient offices of the superior court for the efficient operation of the court." The "obligation to furnish convenient places for the holding of the superior court" is imposed on the commissioner of administrative services. General Statutes § 51-27d. It is particularly significant that

General Statutes § 4-84,[5] which provides for the establishment of a contingency fund in each annual budget with a limit which the governor may not ordinarily exceed in approving necessary emergency expenditures, excepts from such limitation any additional funds needed "for current expenses of any state court . . . ." This statute indicates that the judicial department is not to be restricted to amounts specifically appropriated in providing a court system capable of satisfying constitutional obligations.

It is apparent that the question which the plaintiffs pose for adjudication, whether the financing of the state judicial system has been adequate to avoid the unconstitutional delay which is claimed to exist in the disposition of cases on the jury dockets of the more populous judicial districts, is inappropriate and does not as phrased constitute a "substantial question or issue in dispute . . . which requires settlement between the parties." Practice Book § 390 (b). Since the judicial department itself has constitutional authority, which

[5] "[General Statutes] Sec. 4-84. CONTINGENCY APPROPRIATION. The budget as submitted by the governor to the general assembly shall include a recommended appropriation, provided the total amount of individual allotments from such appropriation shall not exceed the total amount of the contingency appropriation for contingencies not to exceed one hundred thousand dollars for the ensuing fiscal year. Wherever an emergency exists and the governor is of the opinion that the necessities of a budgeted agency warrant an increased appropriation or it is necessary to provide for emergency expenditures, he may approve such expenditures as he deems necessary and for the best interest of the public from such contingency appropriation, provided the total amount of individual allotments from such appropriation shall not exceed the total amount of the contingency appropriation as established by the general assembly. Additions to specific appropriations for current expenses of any state court or for current expenses of state institutions or for maintenance of inmates therein or for the reimbursement of towns for relief, support and hospitalization furnished state paupers or for forest fire suppression shall not be considered as within the total appropriation for such contingencies. The governor shall report to the general assembly, not later than the first session day following February fourteenth of each regular session, all increases made by him under authority of this section and the reasons therefor."

the legislature has recognized in the statutory enactments mentioned, to require the proper officials of the executive department to furnish whatever funds are needed to operate the courts in a constitutionally adequate manner, whether legislative appropriations have been sufficient for that purpose is not the central issue and is virtually an academic question.

The complaint may be construed more broadly, however, to question the adequacy of the number of judges whom the legislature has appointed to the Superior Court. Indeed, this appears to be its basic thrust, as indicated by the allegations concerning the paucity of trial judges in Connecticut in relation to population as compared to other states. Although the number of judges has obvious implications for funding the courts, the implied power of the judiciary to obtain sufficient funds to operate the system in accordance with constitutional requirements has never, heretofore, been thought to include the authority to increase the number of judges or to appoint them. The solution to the problem of delay which the plaintiffs apparently seek is the creation of additional judgeships. "Yet no advocate of inherent power would argue that judges can . . . augment their numbers by writs of mandamus." Hazard, McNamara & Sentilles, "Court Finance and Unitary Budgeting," 81 Yale L.J. 1286, 1290 (1972). Increases in the number of judges, as well as appointments to the additional positions created, are not within the province of the judiciary. Conn. Const., art. V § 2; amend. XX § 2. Nor are the defendants, individually or collectively, empowered to add one judgeship to those authorized by General Statutes § 51-165 or to appoint anyone to fill such a position. Those are prerogatives reserved exclusively to the legislature. "Inasmuch therefore as the judicial power of the state is separated from the legislative and confided to the courts as a separate magistracy, and the power to orga-

nize courts and appoint judges is conferred by special mandatory provisions, requiring direct action by the General Assembly, those powers cannot be delegated, and the appointment of judges, in all cases where the constitution has not been altered by amendment, can only be made by vote of the Assembly." *Brown* v. *O'Connell,* 36 Conn. 432, 448 (1870).

"The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." Conn. Const., art. II. Just as the exercise of judicial power by the legislature is constitutionally prohibited, so is the legislative power forbidden to the judiciary. *Bridgeport Public Library & Reading Room* v. *Burroughs Home,* 85 Conn. 309, 319, 82 A. 582 (1912); *Norwalk Street Ry. Co.'s Appeal,* 69 Conn. 576, 599, 37 A. 1080 (1897); see *Adams* v. *Rubinow,* 157 Conn. 150, 158, 251 A.2d 49 (1968).

"The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." *Colegrove* v. *Green,* 328 U.S. 549, 556, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946). The trial court relied upon this principle in concluding that whether jury docket congestion in the Superior Court constituted an unconstitutional denial of justice without delay was a political question not suitable for judicial determination. Although it is widely assumed that the judiciary, as the ultimate arbiter of the meaning of constitutional provisions, must determine every constitutional claim presented and provide appropriate relief, some constitutional commands fall outside the conditions and purposes that circumscribe judicial action. *Colegrove* v. *Green,* supra, 556. The power of Congress

to provide for "disciplining, the Militia" contained in article one, § 8 of our federal constitution is not subject to judicial surveillance. *Gilligan* v. *Morgan,* 413 U.S. 1, 10, 93 S. Ct. 2440, 37 L. Ed. 2d 407 (1973). The obligation imposed by article two, § 3 upon the President to "take Care that the Laws be faithfully executed" cannot be effectuated by a law suit. *Mississippi* v. *Johnson,* 71 U.S. (4 Wall.) 475, 499, 18 L. Ed. 437 (1866). Claims of violations of the guaranty in article IV § 4 of "a Republican Form of Government" to every state have often been held not amenable to a decision by the courts. *Pacific Telephone Co.* v. *Oregon,* 223 U.S. 118, 142, 32 S. Ct. 224, 56 L. Ed. 377 (1912); *Luther* v. *Borden,* 48 U.S. (7 How.) 1, 42–44, 12 L. Ed. 581 (1849). Constitutional questions involving foreign relations, such as the termination of treaties, recognition of foreign governments, and the duration of hostilities have also been refused a determination in the judicial forum. *Baker* v. *Carr,* 369 U.S. 186, 211–14, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). The characterization of such issues as political is a convenient shorthand for declaring that some other branch of government has constitutional authority over the subject matter superior to that of the courts. "The nonjusticiability of a political question is primarily a function of the separation of powers." *Baker* v. *Carr,* supra, 210. "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from mul-

tifarious pronouncements by various departments on one question." *Baker* v. *Carr,* supra, 217.

Of these criteria, the most significant for our decision is the "textually demonstrable constitutional commitment" of the determination of the number and the appointment of judges to the legislature. "The judges of the . . . superior court shall, upon nomination by the governor, be appointed by the general assembly in such manner as shall by law be prescribed." Conn. Const., art. V § 2. The authority to create additional judgeships as well as to designate those to fill them is necessarily included in this grant and also in article third, § 1 which vests "the legislative power of this state" in the senate and house of representatives. It has been suggested that a more complete separation of the legislative, executive and judicial powers might be achieved if each of these branches were wholly independent of the other and responsible directly to the people. The Federalist No. 51 (J. Madison). Their interdependence in certain critical respects is, however, a significant feature of our system of "checks and balances." We must resist the temptation which this case affords to enhance our own constitutional authority by trespassing upon an area clearly reserved as the prerogative of a coordinate branch of government.

We are also persuaded that there is a "lack of judicially discoverable and manageable standards for resolving" the issues presented by the plaintiffs in the sense that no effective relief can be granted by a court "without expressing lack of the respect due coordinate branches of government." *Baker* v. *Carr,* supra, 217. Moreover, although the problem of delay in the trial of civil jury cases might well be relieved by additional judges, whether it should be resolved in that manner or by legislation analogous to our no-fault motor vehicle insurance statutes; General Statutes §§ 38-319 through 38-351; in order to reduce the volume of liti-

gation coming before civil juries is plainly a decision for the General Assembly. See *Gentile* v. *Altermatt*, 169 Conn. 267, 286–94, 363 A.2d 1 (1975), appeal dismissed, 423 U.S. 1041, 96 S. Ct. 763, 46 L. Ed. 2d 631 (1976). The plaintiffs do not contend that in fashioning judicial relief a court could order such alternative solutions but focus wholly upon the need for increased judicial personnel to operate the existing system. Although the spectrum of possible responses to the problem has been thus confined, what the plaintiffs demand is still beyond our power to grant.

It is well established that a court cannot mandate performance of a constitutional duty by a legislature, particularly where that duty involves the exercise of discretion necessary to the enactment of legislation, as does the appointment of judges and the establishment of their number. *Wells* v. *Purcell*, 267 Ark. 456, 462, 592 S.W. 2d 100 (1979); *Fergus* v. *Marks*, 321 Ill. 510, 152 N.E. 557 (1926); *Watkins* v. *Watkins*, 2 Md. 341, 356 (1852); *Jones* v. *Freeman*, 193 Okla. 554, 564, 146 P.2d 564 (1944). "[I]n all human contrivances confidence must be reposed somewhere, and . . . under the distribution of powers . . . in our State, it is not given to the judiciary to *compel* action on the part of a co-ordinate branch of the government." *Watkins* v. *Watkins*, supra, 356. That the votes of individual legislators should be subject to direct control by judicial decree, which would be necessary to implement a declaration that court congestion had resulted in a violation of the right to justice without delay, is a proposition we cannot accept.

The plaintiffs contend that the question of unconstitutional delay on the jury docket upon which they seek an adjudication, if considered apart from the matter of appropriate relief, is not textually reserved by our state constitution exclusively for the legislature and satisfies the other criteria for justiciability. They sug-

gest that the trial court should have rendered a declaratory judgment on that issue as presented, leaving the problem of relief for some later proceeding in the event that the legislature should fail to act. Although a similar procedure was approved in *Horton* v. *Meskill,* 172 Conn. 615, 650–51, 376 A.2d 359 (1977), implicit in that decision to stay the hand of the judicial department in order to give the legislative branch an opportunity to solve the problem of unequal educational financing was the assumption that, if necessary, appropriate relief could be fashioned by a court within its constitutional bounds. "Courts sit to determine causes and to enforce their determination. It is a general rule that what they cannot enforce they cannot decree." *Clarke's Appeal from Probate,* 70 Conn. 195, 209, 39 A. 155 (1898). It is not our function to render opinions which are simply advisory. *Reply of the Judges,* 33 Conn. 586 (1867). In *Horton* the court had before it various statutory grants for public schools and it concluded that those legislative provisions for financing education in the state violated the provisions of the Connecticut constitution. *Horton* v. *Meskill,* supra, 650. Rather than enjoin the defendants from implementing the existing statutory financing scheme, the customary remedy in such a situation as sought in one of the prayers for relief, the court chose to defer any such action until the legislature had considered the matter further. Id., 618, 653. The case was clearly one where a judicial remedy could have been applied,[6] although its scope would necessarily be far more limited than a solution which the legislature might devise.

[6] The plaintiffs rely upon *Powell* v. *McCormack,* 395 U.S. 486, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969), which found justiciable the issue of whether a congressman, who had been reelected to another term of office despite charges of misconduct, could be excluded from taking his seat as a representative and denied his salary. The court dismissed the declaratory judgment action against those defendants who were legislators, but allowed it to proceed against three employees of the House of Representatives who were involved in enforcing the resolution excluding the plaintiff congress-

In the present case we have concluded that funds are available under the existing statutory framework or by exercise of the inherent power of the Superior Court to enable it, except as limited by the capacity of its present complement of judges, to fulfill its constitutional responsibilities. We have construed the complaint, therefore, to seek an increase in the number of judges available, a remedy which can be achieved only through legislative action. The plaintiffs do not advocate suspension of other court business, such as criminal and nonjury trials, in order to reduce the delay in the disposition of civil jury trials. None of the allegations of the complaint even suggests that existing judicial resources have not been properly allocated. In their brief the plaintiffs commend the action of the chief court administrator in taking appropriate administrative steps to lighten dockets by transferring cases.[7] They also purport to address "only the finance question in this lawsuit because that is the one major facet of the problem that cannot be addressed administratively by the Courts." Neither in their pleadings nor in their brief, however, do the plaintiffs indicate how the declaratory judgment which they seek could be

man from office: the clerk, who had certain duties to perform in seating a representative; the sergeant at arms who would not pay the salary due the plaintiff; and the doorkeeper who would refuse to admit him to the chamber. The possibility of equitable relief against these defendants was not questioned. In the present case we do not perceive, nor have the plaintiffs suggested, any means by which the present defendants can be ordered to provide additional trial judges or to require the legislature to do so.

[7] "Likewise, if judicial resources are not being effectively utilized, the courts can take appropriate administrative steps, such as transferring cases to lighter dockets. This in fact has recently been done by the Chief Court Administrator in certain Hartford cases. The Plaintiffs are addressing only the finance question in this lawsuit because that is the one major facet of the problem that cannot be addressed administratively by the Courts. The Plaintiffs should not be penalized for declining to address those portions of the backlog problem that the courts are capable of resolving on their own. The Plaintiffs will have to prove that increased financing of the judicial system is necessary to avoid unconstitutional delays, but that is a matter of proof foreclosed by the dismissal."

effectively implemented. We find the procedure followed in *Horton* of deciding the substantive issue without contemporaneously formulating appropriate judicial relief to be inapplicable to a situation where it appears that no effective relief by court decree can ultimately be forthcoming.

The plaintiffs are not the first to have called upon the judiciary to remedy the evil of court congestion. *Ad Hoc Committee on Judicial Administration* v. *Massachusetts*, 488 F.2d 1241 (1st Cir. 1973), cert. denied, 416 U.S. 986, 94 S. Ct. 2389, 40 L. Ed. 2d 763 (1974); *De Kosensko* v. *New York*, 311 F. Sup. 126 (S.D. N.Y. 1969), aff'd., 427 F.2d 351 (2d Cir. 1970); *Kail* v. *Rockefeller*, 275 F. Sup. 937 (E.D. N.Y. 1967); *New York State Assn. of Trial Lawyers* v. *Rockefeller*, 267 F. Sup. 148 (S.D. N.Y. 1967). Although the cases cited involved also such questions as the propriety of intervention by the federal courts in the administration of state judicial systems, the opinions uniformly have concluded that the problem of court delay could not be resolved without legislative action and was, therefore, nonjusticiable. "If the only way to eliminate court delay . . . is to provide for more justices, certainly the only way this can be done is by legislative action." *De Kosensko* v. *New York*, supra, 130.

What then will become of the promise extracted from King John at Runnymede and enshrined in the Magna Charta to delay justice to none, which has been incorporated in article first, § 10 of our state constitution? We have declared ourselves unable to respond to its demand in the present context without exceeding our own constitutional authority. The answer must lie in the hearts and minds of the legislators, who are sworn to support the state as well as the federal constitution and to discharge their duties to the best of their abilities. General Statutes § 1-25. More fundamentally, it must rest with the people who elect them.

There is no error.

In this opinion PARSKEY, J., concurred.

ARTHUR H. HEALEY, J., concurring. I agree with the opinion of Justice Shea that the trial court properly granted the motion to dismiss upon the ground that this case was nonjusticiable, i.e., not capable of resolution on the merits by judicial action. I also agree with that opinion's reading and characterization of the issue framed.

Generally, the exercise of the power of the judiciary to review the constitutionality of legislative action does not offend the principle of separation of powers. See, e.g., *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803). There are certain powers which our constitution confers upon the legislative branch. The opinion of Justice Shea aptly notes that the matter of the increase "in the number of judges, as well as appointments to the additional positions created, are not within the province of the judiciary." A challenge, therefore, to the legislature's exercise of such a power committed exclusively to that branch generates a nonjusticiable "political question." Professor Wechsler exposed the viscera of the political question doctrine when he wrote that a political question exists when "the Constitution has committed to another [branch] of government the autonomous determination of the issue raised . . . ." Wechsler, "Toward Neutral Principles of Constitutional Law," 73 Harv. L. Rev. 1, 7–8 (1959); see *Powell* v. *McCormack*, 395 U.S. 486, 519–22, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969); *Baker* v. *Carr*, 369 U.S. 186, 211, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

The demonstrable text of the Connecticut constitution shows that an increase in the number of judges is committed to a coordinate branch of government and is not within the competency of the judicial branch. No

matter how it may be articulated, pragmatically speaking, that is the bottom line in this matter. In observing the difficulty in determining whether a matter has been exclusively committed by the United States constitution to another branch of government, the *Baker* court said that that determination "is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as [the] ultimate interpreter of the Constitution." *Baker* v. *Carr*, supra; accord *Powell* v. *McCormack*, supra, 519–21. The same responsibility rests with this court as the ultimate interpreter of the Connecticut constitution. A political question, therefore, stands apart from the ordinary deference which courts pay to the other branches of government. To conclude that an issue is within the political question doctrine is not an abdication of judicial responsibility; rather, it is "a recognition that the tools with which a court can work, the data which it can fairly appraise, the conclusions which it can reach as a basis for entering judgments, have limits." *United States* v. *Sisson*, 294 F. Sup. 511, 515 (D. Mass. 1968), appeal dismissed, 399 U.S. 267, 90 S. Ct. 2117, 26 L. Ed. 2d 608 (1970). The result in which I concur does not turn on the novelty or complexity of the issues raised by the plaintiffs, but, rather, it is based upon the recognition that it is a matter outside the ambit of judicial resolution. It is for these reasons that I am able to concur in the result reached in Justice Shea's opinion.

I write separately, however, to disassociate myself from what I perceive as the unnecessary discussion in Justice Shea's opinion of the inherent power of the judicial branch. Harmonious cooperation among the three branches of government is fundamental to our system. Justice Shea's opinion, having concluded that the resolution of the issue in this case is beyond the judicial power, and therefore "nonjusticiable," improvidently discusses the inherent power of the judiciary to fund

its operations properly. The coexistence of coequal branches of government is best promoted by reasoned discussion of only those issues necessary for the disposition of the identified question. In this case, the identified question is whether the plaintiffs' complaint states a justiciable claim. As Justice Shea's opinion concludes, the "basic thrust" of the plaintiffs' complaint concerns the adequacy of the number of judges, an issue which, as that opinion aptly demonstrates, is beyond judicial resolution. Therefore, his elaborate discussion of the inherent power of the judiciary to obtain funds to operate the judicial system effectively is unnecessary for the disposition of the identified question in this case.

Because of the nature of Justice Shea's discussion of the inherent power referred to, I am constrained to comment. My colleagues, including the dissenters, agree with the proposition that courts in this state have inherent power to require that expenditures be incurred to permit the judicial branch to operate an effective system of justice. I am firmly convinced that "[i]t was certainly never intended that any one department, through the exercise of its acknowledged powers, should be able to prevent another department from fulfilling its responsibilities to the people under the Constitution." *O'Coin's, Inc.* v. *Treasurer of County of Worcester*, 362 Mass. 507, 511, 287 N.E.2d 608 (1972).

I believe that the Massachusetts Supreme Judicial Court was sage and politic when it stated: "It has been wisely observed: 'The very conception of inherent power carries with it the implication that its use is for occasions not provided for by established methods. . . . [Only when established] methods fail and the court shall determine that by observing them the assistance necessary for the due and effective exercise of its own functions cannot be had, or when an emergency arises which the established methods cannot or do not instantly

meet, then and not till then does occasion arise for the exercise of the inherent power.' *State ex rel. Hillis* v. *Sullivan*, 48 Mont. 320, 329 [137 P. 392 (1913)]. See *Wayne Circuit Judges* v. *Wayne County*, 383 Mich. 10, 39, 42-44, [172 N.W.2d 436 (1969)] (separate opinion by Adams, J.); *Leahey* v. *Farrell*, 362 Pa. 52, 59-60 [66 A.2d 577 (1949)]." *O'Coin's, Inc.* v. *Treasurer of County of Worcester*, supra, 516.

In sum, I reiterate that the elaborate discussion of the inherent power of the judiciary to fund its operations is unnecessary to the result reached in Justice Shea's opinion. I therefore concur in the result.

PETERS, J., with whom GRILLO, J., joins, dissenting. I disagree with the majority's formulation of the principal issue that confronts us in this case, and with its resolution of the question of justiciability. I must, therefore, dissent. In brief, it is my view that the plaintiffs should not be deprived of the opportunity that was afforded to the plaintiffs in *Horton* v. *Meskill*, 172 Conn. 615, 376 A.2d 359 (1977), to make an evidentiary showing that the legislature has violated the state constitution in failing to appropriate sufficient funds for the constitutionally mandated judicial business of this state. I can discern no principled basis for a procedural distinction between a constitutional challenge to legislative underfinancing that is premised, on the one hand, on the right to free public education; Conn. Const., art. VIII § 1; and, on the other hand, on the right to adjudication of civil cases "without sale, denial or delay." Conn. Const., art. I § 10.

This court has not had the occasion to establish definitively the extent to which article first, § 10, confers an enforceable right of access to the courts for the redress of civil grievances. Recently, however, we looked to this provision when we declared unconstitutional, under our equal protection clause, a legislative act limiting gov-

ernmental tort liability when that legislation lacked a rational basis. *Ryskiewicz* v. *New Britain*, 193 Conn. 589, 601, A.2d (1984). We have also held that this provision imposes a constitutional requirement that when the legislature revises common law rights it must provide injured claimants with reasonable alternative remedies. *Gentile* v. *Altermatt*, 169 Conn. 267, 282–87, 292–94, 363 A.2d 1 (1975), appeal dismissed, 423 U.S. 1041, 96 S. Ct. 763, 46 L. Ed. 2d 631 (1976). See *McDonald* v. *Haynes Medical Laboratory, Inc.*, 192 Conn. 327, 334–35, 471 A.2d 646 (1984) (*Speziale, C. J.*, concurring). These cases illustrate our continued recognition of the fact that article first, § 10, which dates from the constitution of 1818, affords a constitutional right to judicial redress of civil grievances. *State* v. *Perkins*, 88 Conn. 360, 368, 91 A. 265 (1914). It is therefore beyond dispute that the plaintiffs herein have a constitutional basis for the claims which they are attempting to pursue. Indeed, the plurality opinion itself concludes that courts, pursuant to their constitutional obligation to provide a constitutionally adequate system of justice without undue delay, have the power to command access to the state treasury for any funds reasonably necessary for that purpose.

The majority nonetheless holds that the plaintiffs have not stated a justiciable claim because they have not stated a "substantial question or issue in dispute . . . which requires settlement between the parties." Practice Book § 390 (b). On the one hand, according to the majority, the constitutional authority of the judiciary to have recourse to the state treasury "to furnish whatever funds are needed to operate the courts in a constitutionally adequate manner" means that insufficient legislative appropriations cannot be the cause of delay in civil jury trials. On the other hand, the basic thrust of the complaint, according to the majority, must be taken to be a request for a court order

to increase the number of judges or to appoint them, and such an order is outside of the scope of the province of the judiciary. The plaintiffs therefore cannot prevail, either because the remedy they seek is not needed or because it is entirely unavailable. My view is in the nature of a plea in avoidance. I do not believe that the plaintiffs are foreclosed from challenging the insufficiency of legislative appropriations nor do I read their complaint as necessarily limited to the appointment of additional judges. I will take up these two matters in reverse order.

I do not understand how the plaintiffs' complaint can be construed, at this stage of the proceedings, to seek only one form of relief. While their complaint does refer to the small number of Connecticut judges in relation to the population of this state, it also addresses the disparity between the state's resources and the state's overall expenditures for the operation of the judicial department. The plaintiffs' prayer for relief broadly seeks: "1. A declaratory judgment that the financing of the state judicial system in Connecticut is unconstitutional under Article First, § 10 of the Connecticut Constitution and Article XIV, Section 1 of the United States Constitution, because of the delays in reaching trial in civil jury cases in Hartford, New Haven, Bridgeport and Stamford. 2. Ancillary injunctive or other equitable relief as needed to enforce compliance with any declaratory judgment which the Court may issue."

It is indisputable that, in ruling whether a complaint survives a motion to dismiss, a court must "take the facts to be those alleged in the . . . complaint construed in a manner most favorable to the pleader." *Amodio* v. *Cunningham,* 182 Conn. 80, 82, 438 A.2d 6 (1980); *Alarm Applications Co.* v. *Simsbury Volunteer Fire Co.,* 179 Conn. 541, 545, 427 A.2d 822 (1980); *Sheets* v. *Teddy's Frosted Foods, Inc.,* 179 Conn. 471, 472, 427 A.2d 385 (1980). "For purposes of appeal, all

well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted." *Amodio* v. *Cunningham,* supra, 83. Furthermore, where, as here, the plaintiffs' prayer for relief seeks not only a declaratory judgment but also general equitable relief, the plaintiffs are entitled to invoke "the long arm of equity" to receive whatever relief "the court may from the nature of the case deem proper. Any relief can be granted under the general prayer which is consistent with the case stated in the complaint and is supported by the proof 'provided the defendant will not be surprised or prejudiced thereby.' " *Cottrell* v. *Cottrell,* 106 Conn. 411, 419–20, 138 A. 458 (1927), quoting 1 Whitehouse, Equity Practice (1915 Ed.) § 119, p. 223; *Balzano* v. *Balzano,* 135 Conn. 584, 590, 67 A.2d 409 (1949). In sum, at least when there is a prayer for general equitable relief, it is the law in our courts, as it is in the federal courts, that "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon* v. *King & Spalding,* U.S. (52 U.S.L.W. 4627, 4628, May 22, 1984).

The fact that the plaintiffs' claims raise novel and complex constitutional questions is not a reason for strict construction of their complaint. The path we should pursue, in such cases, is precisely the opposite. "[T]he more extreme or even far-fetched is the asserted theory of liability, the more important it is that the conceptual legal theories be explored and assayed in the light of actual facts, not a pleader's supposition." *Shull* v. *Pilot Life Ins. Co.,* 313 F.2d 445, 447 (5th Cir. 1963); *Dart Drug Corporation* v. *Corning Glass Works,* 480 F. Sup. 1091, 1098, n.10 (D. Md. 1979). The delicacy of the political balances that are at stake in the resolution of the question of justiciability; *Immigration and Naturalization Service* v. *Chadha,* U.S. , 103 S. Ct. 2764, 2778–80, 77 L. Ed.2d 317 (1983); *State* v.

Nardini, 187 Conn. 109, 112, 445 A.2d 304 (1982); adds further weight to this caution against prejudging issues in the abstract. After a full hearing, the trial court and this court would be much better advised about whether "the matter in controversy [is] capable of being adjudicated by judicial power . . . and [whether] determination of the controversy will result in practical relief to the complainant." *State* v. *Nardini,* supra. Jurisprudential prudence counsels us to await the evidence before we dismiss this complaint.

An exceptionally strict construction of the plaintiffs' complaint might be explicable, although not justified, by the exigency of having to confront an awkward, if not unseemly, inquiry into the power of the judiciary to order the appropriation of funds for its own functioning. Justice Shea and Justice Parskey, however, concede that courts in this state have inherent power to require expenditures to be incurred to permit the judicial branch of government to operate an effective system of justice. I agree with that proposition. Although we acknowledged, in *Eielson* v. *Parker,* 179 Conn. 552, 560, 427 A.2d 814 (1980), that the legislature has the power to appropriate funds to finance the operation of all of the state's programs, including that of the judicial department, we did not there hold that all appropriation matters are exclusively and unreviewably vested in the legislative branch. Cf. *Kinsella* v. *Jaekle,* 192 Conn. 704, 723–30, A.2d (1984).

I would have thought that recognition of the judiciary's inherent power to respond to fiscal constraints that engender unconstitutional delays in the resolution of civil cases would have been a basis for sustaining the validity of the plaintiffs' complaint. We are free to consider this matter unencumbered by the considerations of federalism which have led federal courts to doubt the propriety of *federal* intervention in the administration of *state* judicial systems. See *Ad Hoc Commit-*

tee on Judicial Administration v. *Massachusetts*, 488 F.2d 1241, 1245–46 (1st Cir. 1973), cert. denied, 416 U.S. 986, 94 S. Ct. 2389, 40 L. Ed. 2d 763 (1974); *De Kosensko* v. *New York*, 311 F. Sup. 126, 129 (S.D. N.Y. 1969), aff'd, 427 F.2d 351 (2d Cir. 1970); *Kail* v. *Rockefeller*, 275 F. Sup. 937, 940–42 (E.D. N.Y. 1967); *New York State Assn. of Trial Lawyers* v. *Rockefeller*, 267 F. Sup. 148, 151 (S.D. N.Y. 1967).

The plurality's holding to the contrary is based upon its conclusion that the judicial department itself has unlimited authority to require the proper officials to furnish whatever funds are needed, whether or not the legislature has seen fit to make the necessary appropriations. On this reasoning, the failure of the legislature to act is not the source of the constitutional harm which the plaintiffs claim to have suffered. With deference, this holding seems to me to fly in the face of political reality. Without a judgment that the current level of legislatively approved funding is constitutionally inadequate, which only a court can render, the judicial department's access to unappropriated funds can hardly operate as more than a stopgap device to deal with emergencies that are both finite and acute. Administrative relief is not a likely remedy for systemic underfinancing. Even if I were wrong in this assessment, however, the plaintiff's complaint should still be viable, since the chief court administrator is one of the named defendants. If the fault were to lie in the failure of the judicial department aggressively to pursue unappropriated but needed funds, that fault should therefore be cognizable within the ancillary prayer for relief in this litigation.

As in *Horton* v. *Meskill*, supra, 650–51, I believe that the plaintiffs may pursue declaratory and equitable relief to vindicate their constitutional right to timely adjudication of their civil claims. I would afford them the opportunity to establish, at trial, that there are pro-

grams which, with additional judicial financing, will relieve the civil jury logjam in our courts. This record does not establish why the legislature has failed to take the remedial action to which the plaintiffs claim they are constitutionally entitled. Whatever the reasons may be, legislative inaction does not, to my mind, relieve this court of its independent duty to vindicate the constitutional rights of those who appear before us.

(ii) Opinion of the Connecticut Superior Court

NO. 284635	:	SUPERIOR COURT
MARY D. PELLEGRINO, ET AL	:	JUDICIAL DISTRICT OF HARTFORD-NEW BRITAIN
VS.		
WILLIAM A. O'NEILL, ET AL	:	AT HARTFORD
	:	NOVEMBER 17, 1983

MEMORANDUM OF DECISION
ON
MOTION TO DISMISS

The plaintiffs in this matter allege that delays in the disposition of their various civil actions for money damages pending on the jury dockets in several of the superior courts of the State of Connecticut constitutes a violation of their constitutional rights. The claim is brought to the court by means of a declaratory judgment action seeking to have the court declare that financing of the state judicial system violates the plaintiffs rights under Article First, Section 10 of the Constitution of the State of Connecticut and Article XIV of the Constitution of the United States.

The complaint sets forth for each plaintiff essentially the same basic facts: each has a civil action pending in one or the other of the several superior courts located in the larger counties; that the pleadings are closed and the cases have been claimed for the jury docket; that an analysis of the length of time between the filing of a like case and its disposition by judgment in the Judicial District of New Haven is almost 6 years, in the Judicial District of Hartford/New Britain at Hartford nearly 5 years, in the Judicial District of Fairfield (Bridgeport) almost 5 years and slightly in excess of 5 years in the Judicial District of Stamford/Norwalk.

The plaintiffs have their individual cases pending on one or the other civil jury dockets in those several jurisdictions mentioned above with the oldest case claimed for such docket on December 31, 1976 and the most recent in November, 1981 and, of course, at the time of the filing of this action none had been reached for trial. It is against this factual background that the plaintiffs allege a deprivation of

their constitutional rights by the claimed failure of the Governor of the State of Connecticut, the Comptroller, the Treasurer of the State of Connecticut, and, by permission granted by the court on August 22, 1983 to cite in additional parties defendant the Speaker of the House, President of the Senate and the Chief Court Administrator of the Judicial Department of the State of Connecticut, to adequately fund the judicial department in order to provide the citizens of the state with a means of redress and remedy without delay for adjudication of their civil claims.

By way of contrast with other states the plaintiffs have set forth in their complaint several comparisons and rankings as to trial delays and the number of judges available to serve the population of each state. Connecticut is claimed to be the state with the longest delay in the Nation for such cases and in the lowest third of those twenty states with only full time judges in relation to the population and number of judges. A similar listing of those states where there are both full and part-time judges shows Connecticut again near the bottom in terms of number of judges to serve the population of such states.

The plaintiffs further allege that this state of facts exists in Connecticut which has the second highest per capita income among all the states and yet ranks 48th out of 50 states in judicial department operating expenditures as a percent of personal income.

For purposes of this Motion to Dismiss on grounds of sovereign immunity and nonjusticiable issues the court considers the facts alleged in a manner most favorable to the pleader. *Brewster* v. *Brewster*, 152 Conn. 228, 233.

As a consequence of these claimed shortcomings of the state government the plaintiffs claim as to them a violation by the defendants (1) of Article First, Section 10 of the Connecticut Constitution which provides:

> "All Courts shall be open, and every person, for an injury done to him or his person, property or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

and (2) a violation of Article XIV, Section 1 of the United States Constitution, (the due process clause).

They seek accordingly a declaratory judgment that the financing of the state judicial system in Connecticut is unconstitutional because of the recited delays, anticipating that if the court so finds that the party defendants will be under judicial compulsion to remedy the violation.

The defendants by their Motion to Dismiss claim (1) that they are immune from suit due to sovereign immunity and (2) that the matters alleged in the complaint are nonjusticiable political questions.

The defense of sovereign immunity may be raised in a motion to dismiss an action against the state. *American Laundry Machinery, Inc.* v. *State*, 190 Conn. 202. An action against named officials of the state claimed to be acting in their official capacities is, in effect, an action against the state. *Sentner v. Board of Trustees*, 184 Conn. 339, 342.

While the courts of Connecticut have long recognized the common law principle that the state cannot be sued without its consent, *Horton* v. *Meskill*, 172 Conn. 615, 623; *Textron, Inc.* v. *Wood*, 167 Conn. 334, 339, where it is alleged that the defendant officers are proceeding in an unconstitutional manner in exercising the authority of their office, the interest in the plaintiff's right to be free from the consequences of such action outweighs the interest served by the sovereign immunity doctrine. *Simmons* v. *Parizek*, 158 Conn. 304, 307; *Horton* v. *Meskill*, supra, 624.

"In a constitutional democracy sovereign immunity must relax its bar when suits against the government complain of unconstitutional acts." *Horton* v. *Meskill*, supra, 624.

The declaratory judgment action is held by the court to be "a proper and adoptable vehicle for relief in matters concerning the operations of government." *Sentner*, supra, 344.

The rationale of the doctrine of sovereign immunity in part rests upon the threat to the orderly process of government which likely would be occasioned by the prospect or actuality of unlimited litigation but in *Sentner* the court

observed that trial courts can avoid undue interference with governmental functions by tailoring injunctive relief and scrupulously weighing the equities.

"The declaratory judgment procedure in Connecticut as provided by §52-29 of the General Statutes and Sections 307-313 of the Practice Book (now sections 388-394 Conn. Practice Book 1978 Revision) is peculiarly well adapted to the judicial determination of controversies concerning constitutional rights and, as in these cases, the constitutionality of state legislative or executive action." *Horton* v. *Meskill*, supra 626.

Here the plaintiffs allege that the defendants failure to adequately fund the judicial department is conduct violative of the stated sections of Connecticut and United States Constitutions. In *Horton* the issue presented was the constitutionality of the system of funding public education; in *Textron, Inc.* v. *Wood*, supra, the constitutional taking of property and in other cases referred to in *Horton*, supra 626, the court had endorsed the declaratory judgment action as the appropriate vehicle. These are not so dissimilar to the instant case as to persuade the court that the doctrine of sovereign immunity should prevail as a bar to this action.

The second issue raised by the defendants advances the claim that the matters alleged in the complaint are nonjusticiable political questions. Before a claimed controversy is entitled to a resolution on the merits it must be justiciable. Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute (2) that the interests of the parties be adverse (3) that the matter in controversy be capable of being adjudicated by judicial power and (4) that the determination of the controversy will result in practical relief to the complainant. *State* v. *Nardini*, 187 Conn. 109, 111.

Included in a consideration whether the matter in controversy be capable of being adjudicated by judicial power is the appropriateness of the subject matter for judicial consideration. *Baker* v. *Carr*, 369 U.S. 186, 198, 82 S. Ct. 691, 7 L. Ed. 2d 663. The defendants herein claim that the

matter cannot be thoroughly and completely adjudicated in that the plaintiffs ask the court to consider but one cause and remedy, namely underfunding, to a multifaceted problem.

The matter of funding and implementation of funding the judicial branch is solely within the province of the legislative and executive branches. *Eielson* v. *Parker*, 179 Conn. 552, 560. The defendants claim that the issue raised is a political question best left to the political branches of government. The elements which may identify the doctrine of separation of powers were stated in *Baker* v. *Carr*, supra 217:

> "Prominant on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a courts undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Baker went on to state that unless one of those formulations is inextricable from the case at bar there should be no dismissal for nonjusticiability on the ground of a political questions presence.

Our Supreme Court in *Horton* v. *Meskill*, supra 627, while upholding the lower courts determination that the financing of the educational system in the state violated provisions of the state and federal constitution observed that there are proper limitations on judicial intervention and the need to avoid any serious interference with the other departments of our government as regards the performance of their functions and with their control over their respective instrumentalities, funds and property. Block, "Suits Against Government Officers and The Sovereign Immunity Doctrine" 59 Harv. L. Rev. 1060, 1061. Therefore, while there may be conduct on the part of the defendants which a court

could hold to be constitutionally violative of another's rights if it is determined that the remedy sought from the court could not be undertaken without expressing lack of respect due coordinate branches of government the court must conclude that the issue presented is one of nonjusticiability.

The case of *New York State Association of Trial Lawyers* v. *Rockerfeller*, 267 F. Supp. 148 involved a claim on the part of the plaintiffs that malapportionment of judges sitting in the various judicial districts and counties of the state resulted in court delay for civil litigants and constituted a violation of the litigants constitutional rights as guaranteed under the equal protection clause of the Fourteenth Amendment. The court observed therein at page 154, "even if a federal court were inclined to undertake the solution of state court delay, the present 'lack of judicially discoverable and managerable standards for resolving it' as well as 'respect due coordinate branches of government' make the 'political' issues raised by the complaint inappropriate for judicial resolution."

Article First, Section 10 of the Connecticut Constitution provides that the court shall be open and every person . . . shall have remedy by due course of law and right and justice administered without . . . delay.

Article One, Section 8 in treating of criminal prosecutions insures to every accused the right to a speedy trial. The failure to insure a timely disposition of criminal charges has been found to constitute a violation of an accused's constitutional rights. *State* v. *Nims*, 180 Conn. 589, 591. The framers of the constitution presumably drew a distinction between the interests to be protected in criminal matters as apposed to civil matters with the differing language that was employed as to each.

Plaintiffs counsel at oral argument on this motion likened this complaint and the relief sought to the *Horton* v. *Meskill*, (supra) case which was successfully prosecuted by the same counsel. The decision in Horton determined that the system of financing public education as established by legislation was unconstitutional in its application to the various com-

munities within the state. In that case, as in this, plaintiff claims that this court should limit its judgment to a declaratory one while retaining jurisdiction for consideration of the granting of consequential relief allowing the legislature an opportunity to act in the interim. In *Horton* the court observed, quoting from *San Antonio Independent School District* v. *Rodriquez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 at page 59, "The ultimate solution must come from the lawmakers and from the democratic pressures of those who elect them."

As to equalization of learning opportunities the court observed that there existed in many states various methods already in operation to accomplish that result and consequently the court in *Horton* was able to suggest what avenues might be considered by the legislature to bring about the desired result.

No such guidelines exist in the instant case. While this court might suggest the need for additional judges, and the need for additional courthouses as a means of obviating the delays alleged by the plaintiffs these are and have been matters of continuing concern and attention by the Judicial Department, the Executive Department and the Legislature.

Disparities in various parts of the state as to length of time for judicial disposition are not susceptible to remedy by principles of reapportionment. *Kail* v. *Rockerfeller* 275 F. Supp. 937, 941.

This court is of the opinion and so holds that while the declaratory judgment action is the appropriate vehicle to address the concerns and claims of the plaintiffs the issue is not one which is capable of being adjudicated by judicial power without violating the principles of separation of powers. "The constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and ultimately, on the vigilance of the people in exercising their political rights."

Colegrove v. *Green*, 328 U.S. 549. The issues raised herein seem, at least to this court, to be included among those such duties.

Accordingly, the motion to dismiss is granted.

/s/ RIPLEY, J.
George W. Ripley

iii

Judgment

[Certification omitted in printing]

NO. 12369

Mary D. Pellegrino, et al	:	Supreme Court
v.	:	At Hartford
William A. O'Neill, et al	:	August 1, 1984

JUDGMENT

This appeal by the plaintiffs from the judgment of the Superior Court of Hartford-New Britain at Hartford was filed with the Clerk of said Court on the 22nd day of November, 1983, and said appeal came thence to the 22nd day of November, 1983, when the appellant filed their Preliminary Statement of Issues, as may appear in the record on file in this Court, thence to March 2, 1984, when the parties appeared and were fully heard.

And now this Court finds that there is no error.

Whereupon it is adjudged that there is no error.

Date of Judgment: July 17, 1984

By the Court,

FRANCIS J. DRUMM, JR.
CHIEF CLERK

BY: /s/ CYNTHIA M. GWOREK
Assistant Clerk-Appellate

(iv) Notice of Appeal

IN THE SUPREME COURT OF THE STATE OF CONNECTICUT

Mary D. Pellegrino, et al
appellants, : No. 12369

vs.

William A. O'Neill, et al : August 10, 1984
appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Mary D. Pellegrino, Cornelius Cotton, Sr., Michael Tamburri, Jessica Tamburri, Lillian Lowell, Dawn Guerrera, Salvatore Guerrera, Shirley Driscoll, John M. Kroeton, Joseph D. Cohen, Anne Kearney, David Maffuid, Joseph De Lawrence and Donald Thibodeau, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Connecticut, affirming the dismissal of the complaint, entered in this action on July 17, 1984.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

MARY D. PELLEGRINO, ET AL

By /s/ WESLEY W. HORTON

WESLEY W. HORTON of
MOLLER, HORTON & FINEBERG, P.C.
90 Gillett Street
Hartford, Connecticut 06105
Their Attorney

[Certification to counsel omitted in printing]

(v) Substituted Complaint

NO. CV 83 284635	:	SUPERIOR COURT
MARY D. PELLEGRINO, ET AL	:	JUDICIAL DISTRICT OF HARTFORD-NEW BRITAIN
VS.		
WILLIAM A. O'NEILL, ET AL	:	AT HARTFORD
	:	AUGUST 22, 1983

SUBSTITUTED COMPLAINT

(Amendments are found in new paragraphs 16-19).

1. The Plaintiff MARY D. PELLEGRINO is a plaintiff in a civil action claiming money damages entitled "Mary D. Pelligrino vs. Andrew Biancur" (Docket No. 151224) presently pending in the Superior Court for the Judicial District of New Haven. The case was returned to court on December 14, 1976 and has not been reached for trial even though the case was claimed for the trial list on December 31, 1976 and for the jury docket on December 31, 1976.

2. The Plaintiff CORNELIUS COTTON, SR. is a plaintiff in a civil action claiming money damages entitled "Cornelius Cotton, Sr. vs. Wolfgang M. Haller, et al" (Docket No. 156133) presently pending in the Superior Court for the Judicial District of New Haven. The case was returned to court on November 8, 1977 and has not been reached for trial even though the case was claimed for the trial list on July 11, 1979 and for the jury docket on June 29, 1979.

3. The Plaintiffs MICHAEL TAMBURRI and JESSICA TAMBURRI are the plaintiffs in a civil action claiming money damages entitled "Michael Tamburri, et al vs. Sally Caratola" (Docket No. 40203) presently pending in the Superior Court for the Judicial District of Stamford-Norwalk. The case was returned to court on May 22, 1979 and has not been reached for trial even though the case was claimed for the trial list on July 11, 1979 and for the jury docket on June 29, 1979.

4. The Plaintiff LILLIAN LOWELL is the plaintiff in a civil action claiming money damages entitled "Lillian Lowell vs. Horseshoe Restaurant" (Docket No. 1673343)

presently pending in the Superior court for the Judicial District of Fairfield (Bridgeport). The case was returned to Court on October 25, 1977 and has not been reached for trial even though the case was claimed for the trial list on June 7, 1978 and for the jury docket on December 8, 1977.

5. The Plaintiffs DAWN GUERRERA and SALVATORE GUERRERA are the plaintiffs in a civil action entitled "Dawn Guerrera, et al vs. Ralph DeFeo" (Docket No. 252791) presently pending in the Superior Court for the Judicial District of Hartford-New Britain at Hartford. The case was returned to court on December 2, 1980 and has not been reached for trial even though the case was claimed for the trial list on October 23, 1981 and for the jury docket on November 6, 1981.

6. The Plaintiff SHIRLEY B. DRISCOLL is the plaintiff in a civil action claiming money damages entitled "Shirley B. Driscoll vs. Irene J. Nolan, et al" (Docket No. 161491) presently pending in the Judicial District of New Haven. The case was returned to court on August 29, 1978 and has not been reached for trial even though the case was claimed for the trial list on February 20, 1979 and for the jury docket on February 20, 1979.

7. The Plaintiff JOHN KROETON is a plaintiff in a civil action claiming money damages entitled "John Kroeton vs. Dena Laquay" (Docket No. 153298) presently pending in the Judicial District of New Haven. The case was returned to court on April 26, 1977 and has not been reached for trial even though the case was claimed for the trial list on April 29, 1978 and for the jury docket on August 23, 1977.

8. The Plaintiff JOSEPH D. COHEN is the plaintiff in a civil action claiming money damages entitled "Joseph D. Cohen, et al v. Firestone Tire and Rubber Co., et al" (Docket No. 2143429) presently pending in the Superior Court for the Judicial District of Hartford-New Britain at Hartford. The case was returned to court on October 18, 1977 and has not been reached for trial even though the case was claimed for the trial list on October 12, 1979 and for the jury docket on June 9, 1978.

9. The Plaintiff ANNE KEARNEY is a defendant in a civil action claiming money damages, wherein $13,000 of defendant's money is currently being held in escrow pending the outcome of the action. The action, entitled "Wesley James McDade v. Anne Kearney" (Docket No. CV-78-0161447), presently pending in the Superior Court for the Judicial District of New Haven, was returned to court on September 12, 1978, and has not been reached for trial even though the case was claimed for the trial list on April 7, 1980 and for the jury docket on April 7, 1980.

10. The Plaintiff DAVID MAFFUID is a plaintiff in a civil action claiming money damages entitled "David Maffuid v. Godfrey Baekey, et al" (Docket No. CV-80-48146S) presently pending in the Superior Court for the Judicial District of Stamford-Norwalk. The case was returned to court on September 16, 1980 and has not been reached for trial even though the case was claimed for the trial list on April 1, 1981 and for the jury docket on April 1, 1981.

11. The Plaintiff JOSEPH DE LAWRENCE is a plaintiff in a civil action claiming money damages entitled "Joseph De Lawrence v. Miguel A. Tirado, et als" (Docket No. 223837) presently pending in the Superior Court for the Judicial District of Hartford-New Britain at Hartford. The case was returned to court on November 28, 1978 and has not been reached for trial even though the case was claimed for the trial list on September 20, 1978 and for the jury docket on December 18, 1978.

12. The Plaintiff DONALD R. THIBODEAU is a plaintiff in a civil action claiming money damages entitled "Donald R. Thibodeau v. Roncari Industries, Inc., et al" (Docket No. 199179) presently pending in the Superior Court for the Judicial District of Hartford-New Britain at Hartford. The case was returned to court on October 28, 1975 and has not been reached for trial even though the case was claimed for the trial list on March 22, 1976 and for the jury docket on March 22, 1976.

13. The Defendant WILLIAM A. O'NEILL is the Governor of the State of Connecticut and in such capacity is the

state's chief executive officer.

14. The Defendant HENRY E. PARKER is the Treasurer of the State of Connecticut and in such capacity is responsible for the receipt and disbursement of public money.

15. The Defendant EDWARD CALDWELL is the Comptroller of the State of Connecticut and in such capacity is responsible for adjusting and settling public accounts and demands.

16. The Defendant MAURICE J. SPONZO is the Chief Court Administrator and in such position has general supervision and control of the state's judicial interests.

17. The Defendant IRVING J. STOLBERG is the Speaker of the House of Representatives and in such position is its presiding officer.

18. The Defendant JOSEPH J. FAULISO is the President of the Senate and in such position is its presiding officer.

19. Pursuant to Article Third, Sec. 1 of the Constitution, the Senate and the House of Representatives are vested with the legislative power of the state, including the power to appropriate operating funds to the Judicial Department.

20. For the time period commencing July 1, 1982 and concluding April 30, 1983, the average length of time between the filing of a civil jury non-family case and the disposition of such case by judgment following a trial in the Judicial District of New Haven is 5 years, 9 months and 5 days.

21. For the time period commencing July 1, 1982 and concluding April 30, 1983, the average length of time between the filing of a civil jury non-family case and the disposition of such case by judgment following a trial in the Judicial District of Stamford-Norwalk is 5 years, 1 month and 10 days.

22. For the time period commencing July 1, 1982 and concluding April 30, 1983, the average length of time

between the filing of a civil jury non-family case and the disposition of such case by judgment following a trial in the Judicial District of Fairfield (Bridgeport) is 4 years, 9 months and 9 days.

23. For the time period commencing July 1, 1982 and concluding April 30, 1983, the average length of time between the filing of a civil jury non-family case and the disposition of such case by judgment following a trial in the Judicial District of Hartford-New Britain at Hartford is 4 years, 11 months and 17 days.

24. To the Plaintiffs' knowledge, no judicial district or area within any of the other 49 states or the District of Columbia has an average delay in any type of case equal to or longer than the average delay in a civil jury non-family case and the disposition of such case by judgment following a trial in the Judicial Districts of New Haven, Stamford-Norwalk, Fairfield and Hartford-New Britain at Hartford.

25. All other major metropolitan areas of the country of which the plaintiffs are aware have delays between the filing of a civil action and the disposition of such case by judgment following a jury trial which are much shorter than the delays in the New Haven, Stamford, Bridgeport and Hartford metropolitan areas. The average or median delays for a civil jury case in numerous representative metropolitan areas are as follows:

Metropolitan Area	Period of Data	Type of Data	Delay
1. San Mateo County, CA	1982	Median	5.5 months
2. Worcester County, MA	1982	Median	11.9 months
3. District of Columbia	1982	Average	14.0 months
4. Hampden County, MA (Springfield)	1982	Median	17.0 months
5. San Francisco County, CA	1982	Average	18.0 months
6. Essex County, NJ (Newark)	1982	Average	19.3 months
7. Dallas County, TX	1981	Average	21.0 months
	(1983 estimated	Average	24.0 months)
8. Mercer County, NJ (Trenton)	1982	Average	22.3 months
9. Middlesex County, MA (Cambridge)	July 1981 to July 1982	Median	23.4 months

10. Suffolk County, MA (Boston)	July 1981 to July 1982	Median	28.0 months
11. Allegheny County, PA (Pittsburgh)	1982	Average	30.3 months
12. Los Angeles County, CA	1982	Median	40.5 months
13. Harris County, TX (Houston)	Jan. 1983 to May 1983	Average	42.0 months
14. Cook County, IL (Chicago)	1982	Average	52.0 months
15. Wayne County, MI (Detroit)	1980	Median	52.0 months
	(1983 estimated	Median	38.0 months)
16. Fairfield Judicial District (Bridgeport)	July 1982 to April 1983	Average	57.3 months
17. Hartford Judicial District	July 1982 to April 1983	Average	59.6 months
18. Stamford Judicial District	July 1982 to April 1983	Average	61.3 months
19. New Haven Judicial District	July 1982 to April 1983	Averge	69.2 months

26. The population of the State of Connecticut as of 1982 was 3,153,000.

27. The number of authorized permanent full-time trial judges on the Connecticut Superior Court is 125.

28. Connecticut has the third lowest number of full-time trial judges in relation to population of the 19 states and the District of Columbia in which most judicial business is conducted by permanent full-time trial judges as indicated below:

State	No. of Full Time Judges	1982 Population in Thousands	Population Per Judge
1. Nevada	111	881	7,937
2. Idaho	108	965	8,935
3. Pennsylvania	884	11,865	13,422
4. District of Columbia	43	631	14,675
5. Nebraska	108	1,586	14,685
6. Illinois	723	11,448	15,834
7. Louisiana	265	4,362	16,460
8. Kentucky	214	3,667	17,136
9. Florida	545	10,416	19,112
10. Virginia	284	5,491	19,335
11. Massachusetts	278	5,781	20,795
12. Vermont	24	516	21,500

13. Minnesota	189	4,133	21,868
14. Maryland	193	4,265	22,098
15. Rhode Island	43	958	22,279
16. Hawaii	43	994	23,116
17. New Jersey	317	7,438	23,464
18. Connecticut	125	3,153	25,224
19. Maine	44	1,133	25,750
20. North Carolina	210	6,019	28,662

29. As to 23 other states where a large amount of judicial business is conducted by part-time judges, 20 out of the 23 still have more permanent full-time trial judges in relation to population than Connecticut, as indicated below:

State	No. of Full Time Judges	1982 Population in Thousands	Population Per Judge
1. Delaware	88	602	6,841
2. West Virginia	210	1,948	9,276
3. Kansas	213	2,408	11,305
4. North Dakota	52	670	12,885
5. Oklahoma	202	3,177	15,728
6. Missouri	302	4,951	16,394
7. South Dakota	42	691	16,452
8. Wyoming	30	502	16,733
9. Arizona	170	2,860	16,823
10. New Mexico	76	1,359	17,882
11. Oregon	141	2,649	18,787
12. Washington	220	4,245	19,295
13. Alabama	204	3,943	19,328
14. California	1,220	24,724	20,266
15. Indiana	264	5,471	20,723
16. Michigan	438	9,109	20,797
17. Ohio	509	10,791	21,200
18. Montana	32	801	25,031
19. Utah	62	1,554	25,064
20. Wisconsin	190	4,765	25,079
(Connecticut	125	3,153	25,224)
21. Mississippi	101 (excluding 410 full time justices of the peace)	2,551	25,257
22. South Carolina	123	3,203	26,041
23. Tennessee	117	4,651	39,752

30. The per capita income in the State of Connecticut in 1982 was $13,687.00, which is the second highest among the 50 states.

31. For the latest data available, the State of Connecticut ranks 48th out of 50 states (ahead only of Arkansas, and tied

with Indiana) in the total state and local judicial department operating expenditures as a percent of personal income.

32. The amount of operating funds appropriated by the State of Connecticut for its judicial department in fiscal 1982 was $49,413,846, which is inadequate for the purpose of providing its citizens with a means of redress and remedy without delay for their civil claims.

33. Article First, Section 10 of the Connecticut Constitution states as follows:

> All Courts shall be open, and every person, for an injury done to him or his person, property or reputation shall have remedy *by due course of law*, and right and justice administered without sale, denial *or delay* [emphasis added].

34. In Hartford, New Haven, Bridgeport and Stamford, the delay between the filing of a civil case and the commencement of a jury trial is a violation of Article First, §10 of the Connecticut Constitution.

35. Article XIV, Section 1, of the United States Constitution states in part that no state shall deprive any person of life, liberty or property without due process of law.

36. In Hartford, New Haven, Bridgeport and Stamford, the delay between the filing of a civil case and the commencement of a jury trial is a violation of Article XIV, Section 1 of the United States Constitution.

WHEREFORE, the Plaintiffs claim as follows:

1. A declaratory judgment that the financing of the state judicial system in Connecticut is unconstitutional under Article First, §10 of the Connecticut Constitution and Article XIV, Section 1 of the United States Constitution, because of the delays in reaching trial in civil jury cases in Hartford, New Haven, Bridgeport and Stamford.

2. Ancillary injunctive or other equitable relief as needed to enforce compliance with any declaratory judgment which the Court may issue.

PLAINTIFFS

By /s/ WESLEY W. HORTON

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[Statement re damages and certification to counsel omitted in printing]

Office - Supreme Court, U.S.
FILED
SEP 7 1984
ALEXANDER L. STEVAS
CLERK

No. 84-245

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARY D. PELLEGRINO, ET AL.

Appellants,

v.

WILLIAM A. O'NEILL, ET AL.

Appellees.

ON APPEAL FROM THE
SUPREME COURT OF CONNECTICUT

MOTION IN THE ALTERNATIVE TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Is a cause of action justiciable which seeks legal relief for the allegedly inadequate funding by the state legislature of the State of Connecticut's judicial system?

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1984

No. 84-245

Mary D. Pellegrino, et al.,
Appellants,

v.

William A. O'Neill, et al.,
Appellees.

On Appeal From the Supreme
Court of Connecticut

MOTION IN THE ALTERNATIVE
TO DISMISS OR AFFIRM

Pursuant to Rule 16.1 of the Rules of this Court, Appellees move that this appeal be dismissed or alternatively that the judgment of the Connecticut Supreme Court be affirmed.

If the Court elects to treat the Jurisdictional Statement as a petition for certiorari, certiorari should be denied.

OPINIONS BELOW

The opinion of the Connecticut Superior Court is not reported. It is reprinted in the Jurisdictional Statement Appendix (J.S. App.) at 28a. The opinion of the Connecticut Supreme Court (J.S. App. 2a-27a) is reported at 193 Conn. 670, ____A.2d____ (1984).

JURISDICTION

The Judgment of the Connecticut Supreme Court was entered on July 17, 1984. Notice of Appeal (J.S. App. 37a) was filed on August 13, 1984. While

appellants claim jurisdiction in this Court under 28 U.S.C. § 1257(2), appellees deny appellate jurisdiction under any allowable ground.

STATUTES INVOLVED

The appellees do not differ with the appellants' submission on this point. No statute is involved.

STATEMENT

By complaint dated July 9, 1983, appellants sought declaratory and ancillary injunctive relief against appellee state officials, alleging that the State of Connecticut had inadequately funded its judicial department, thereby offending Article I, § 10 of the Connecticut Constitution requiring the administration of justice

"without delay," and fourteenth amendment due process standards. The Connecticut Superior Court, on November 17, 1983, on motion of appellees, dismissed the suit on justiciability grounds, because "the issue is not one which is capable of being adjudicated by judicial power without violating the principles of separation of powers." (J.S. App. 34a).

On appeal, the Connecticut Supreme Court read appellants' complaint in two ways. If the complaint challenged past legislative appropriations, it was dismissable essentially as moot and as an academic question because the judicial department itself had the inherent power to mandate that funding of the courts occur at a constitutional level. (J.S. App. 9-10a).

If, however, the complaint were "construed more broadly...to question the adequacy of the number of judges whom the legislature has appointed to the Superior Court" (J.S. App. 10a), the matter was nonjusticiable, offending separation of powers principles under the Connecticut Constitution. Alleged rights of appellants under the fourteenth amendment were dismissed summarily as the right to civil jury trials in state courts is not so "fundamental as to qualify for protection." J.S. App. 4a, note 3 (citing Hardware Dealers Mutual Fire Ins. Co. v. Gidden Co., 284 U.S. 151, 158 (1931)).

ARGUMENT

1. This Court should dismiss the appeal for lack of jurisdiction, pursuant to Supreme Court Rule 16.1(a). Jurisdiction is invoked under 28 U.S.C. § 1257(2) which requires that a statute have been "drawn in question" in a state court. The issue raised by appellants--the justiciability of an attack on the budgetary priorities of the state legislature--obviously draws in question no state statute. Cf. Garrity v. New Jersey, 385 U.S. 493 (1967) (since the challenged job forfeiture statute was too tangentially connected to the actual self-incrimination issue, appeal is inappropriate under 28 U.S.C. § 1257(2)).

Even if the issue of sufficient appropriations by the state legislature is properly raised by appellants--an issue never reached on the merits by the Connecticut Supreme Court--this claim does not in any way fall within appellate jurisdiction as a challenge to a statute. 1/

This Court recently addressed a similar issue in Silkwood v. Kerr-McGee Corp., ____U.S.____, 104 S.Ct. 615, 620, 621 (1984), where no appellate

---

1/ Appellees do not question that for purposes of § 1257(2), a "statute" may include state constitutional provisions, local ordinances, and executive orders issued under delegated legislative authority. In no case, however, has this Court accepted appellate jurisdiction of a claim like that raised herein.

jurisdiction was found under the closely related provisions of 28 U.S.C. § 1254(2):

> [I]n keeping with the policy that statutes authorizing appeals are to be strictly construed...we have consistently distinguished between those cases in which a state statute is expressly struck down on constitutional grounds and those in which an exercise of authority under state law is invalidated without reference to the state statute. The former come within the scope of § 1254(2)'s jurisdictional grant...the latter do not.... The present case falls into the second category.... [The Court of Appeals] did not purport to rule on the constitutionality of the Oklahoma punitive damages statute. The court did not mention the statute, and the parties did not contest or defend the constitutionality of the statute in their appellate briefs....

> Therefore, the present appeal is not within our § 1254(2) appellate jurisdiction. (Citations and footnotes omitted).

See also Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 563 n.4 (1980).

The Court had traditionally scrutinized the appeal to determine whether a statute has actually been challenged in the state courts. Thus, in Wilson v. Cook, 327 U.S. 474 (1946), where the appellant challenged in the state courts the validity of a tax, as opposed to the tax statute itself, no appellate jurisdiction was found:

> This jurisdictional requirement is satisfied only if the record shows that the question of the validity under federal law of the state statute, as

> construed and applied, has either been presented for decision to the highest court of the state...or has in fact been decided by it...and that its decision was necessary to the judgment.... The record in this case does not disclose that at any time in the course of the proceedings in the state courts plaintiffs asserted the invalidity of a state statute on any federal ground. Id. at 480. (Citations omitted).

See also Memphis Natural Gas Co. v. Beeler, 315 U.S. 649 (1942) (challenge to assessment of tax was not proper appeal); R. Stern and E. Gressman, Supreme Court Practice, 5th Ed., at 162-3.

Here, appellants have never challenged or drawn into question at any

level of the proceedings any state statute regarding appropriations for the judiciary. Indeed, in the Jurisdictional Statement, appellants admit that "[t]heir claim is not directed against a specific Connecticut Statute." (J.S. 1). Since, at most, appellants question the discretionary actions of the legislature in appropriating funds, their appeal clearly fails jurisdictionally. And since, in fact, appellants challenge here only a finding of nonjusticiability, appellate jurisdiction is all the more remote.

2. This appeal is also subject to dismissal because the judgment rests on an adequate non-federal basis, Rule

16.1(b). [2/]

The most recent articulation of the standard upon which the matter of a "non-federal ground" is determined appears in Michigan v. Long,

___U.S.___103 S.Ct. 3469 (1983):

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independency of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

103 S.Ct. at 3476. (Emphasis added).

2/ This contention also supports a denial of certiorari should the Court treat the appellants' papers as a petition for certiorari pursuant to 28 U.S.C. § 2103. See further discussion infra, at 15.

Where, however, the state court bases its decision "clearly and expressly" on separate and adequate grounds, no Supreme Court review is proper. Id. In Long, the Court found that the state court had relied almost exclusively on federal cases in reaching its decision, and thus concluded that the decision was not on a non-federal ground. See also Oliver v. United States, _____U.S._____, 104 S.Ct. 1735, 1739, n.5 (1984) (state court referred only to federal cases in search and seizure decision): Florida v. Meyers, _____U.S._____, 104 S.Ct. 1852, 1853 (1984) (a brief mention of "another appellate point" does not raise non-federal basis).

In the recent case of Colorado v. Nunez, _____U.S._____, 104 S.Ct. 1257 (1984), a writ of certiorari was dismissed as improvidently granted. The concurring opinion of Justice White, joined by the Chief Justice and Justice O'Connor, demonstrated that the state court had reached a conclusion on suppression of evidence based upon Colorado, rather than federal law.

A review of the opinion of the Connecticut Supreme Court demonstrates that the justiciability issue was based on the separation of powers under the Connecticut Constitution. Separation of powers principles differ, of course, significantly among the states, as do state constitutional provisions addressing justice without delay.

The Connecticut Supreme Court relied, therefore, and necessarily, on Connecticut constitutional jurisprudence. The court viewed the doctrine of separation of powers as the key element in resolving the issue of justiciability. (J.S. App. 12a).

This is hardly a matter then where, as in Long, the state law ground does not appear from the face of the opinion. Moreover, the state law ground for nonjusticiability would be determinative even if federal constitutional law would arguably have been relevant if the court were able to reach the merits.

3. Treating this appeal as a petition for certiorari, 28 U.S.C. § 2103, the

petition should be denied as failing to meet the criteria of Supreme Court Rule 17. 3/

a. The Connecticut Supreme Court's decision is not in conflict, legally or "philosophically" (J.S. at 4), with the decision of any state court of last resort, any federal court of appeals, or of this Court. Every court to consider similar suits seeking a judicial remedy to civil court delay has dismissed the action on justiciability grounds. See Ad Hoc Committee on Judicial Administration v. Massachusetts, 488

3/ These considerations also justify dismissal under Rule 16.1(b) (lack of substantial federal question) and affirmance under Rule 16.1(d) (so unsubstantial as to not need further argument).

F.2d 1241 (1st Cir. 1973), cert. denied, 416 U.S. 986 (1974); Dekosensko v. New York, 311 F.Supp. 126 (S.D.N.Y. 1969), aff'd, 427 F.2d 351 (2d Cir. 1970); Kail v. Rockefeller, 275 F.Supp. 937 (E.D.N.Y. 1967); New York State Association of Trial Lawyers v. Rockefeller, 267 F.Supp. 148 (S.D.N.Y. 1967). 4/

Nor is there any conflict with this Court's holdings in Baker v. Carr, 369 U.S. 186 (1962) or Immigration and Naturalization Service v. Chadha,

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4/ Appellants attempted to distinguish these cases in the Connecticut courts as involving only federal justiciability standards. They urged the Connecticut courts to employ a different test based on the Connecticut Constitution. Appellants' brief in Connecticut Supreme Court at 9. That is precisely what the Connecticut Supreme Court did. And it is precisely why this matter should be dismissed as based on a non-federal ground. See supra at 11.

____U.S.____, 103 S.Ct. 2764 (1983).

The fact that Connecticut decisions on justiciability borrow some analysis from this Court's decisions on justiciability cannot obscure the fact that the justiciability of an issue involving the separation of powers in Connecticut government is--and must be--based on the Connecticut Constitution. See e.g., concurring opinion of Healey, J. at J.S. App. 19a. Even if only federal constitutional standards were applicable in this case, nothing in the Connecticut opinion is in any way inconsistent with Baker. 5/

5/ Obviously, the Connecticut Supreme Court does not often deal with the examples from Baker relied upon by appellants (J.S. 4) as the "strongest" for a conclusion of
(continued on next page)

b. This case does not present an important question of federal law. Indeed, the case is factually unsuitable to present any question to this court.

According to the majority opinion of Connecticut Supreme Court, the complaint was capable of at least two constructions. (J.S. App. 9a, 10a).

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fn 5/ continued

nonjusticiability--foreign relations, duration of hostilities, validity of legislative enacting process, status of Indian Tribes, or a guarantee of Republican form of government. But that list of examples is scarcely inclusive of all nonjusticiable issues under Baker principles. In any event, appellants' examples cannot bind a state court's consideration of what is justiciable under its own constitution.

The dissenting justices found another way to read the appellants' pleadings. (J.S. App. 25a). Appellants now advance yet another construction of their complaint--denial of due process due to improper court delays. J.S. at 3. The very fact that the complaint in this case is sufficiently unclear as to support multiple constructions is additional demonstration that it is singularly inappropriate for this Court's attention.

Even, however, without these defects, this case does not present issues worthy of certiorari. In fact, another case, Ad Hoc Committee, supra, which much more fully discussed the issues of court delay under federal due process standards, state financing and justiciability was not accepted for review by this court.

Moreover, this appeal does not raise separation of powers questions like those at issue in I.N.S. v. Chadha, supra, and Buckley v. Valeo, 429 U.S. 1 (1976). Here the Connecticut Supreme Court has resolved the issue of divisions of power among the three branches of Connecticut government based upon state law principles. 6/

c. The Connecticut Supreme Court, in fact, reached the correct result.

6/ The pre-Chadha state court decisions on legislative vetoes analyzed the issue in terms of the particular state constitution. See, e.g., Opinion of the Justices, 431 A.2d 783 (N.H. 1981); Barker v. Manchin, 279 S.E. 2d 622 (W.Va. 1981); State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska, 1980). Yet, this Court chose not to discuss these decisions at all in Chadha.

The Court held much of the matter moot and therefore not satisfying an element necessary for a declaratory judgment--a "substantial question or issue in dispute...which requires settlement between the parties." Conn.P.Bk. § 390(b). The Court held that the "judicial department itself has constitutional authority, which the legislature has recognized in the statutory enactments mentioned, to require the proper officials of the executive department to furnish whatever funds are needed to operate the courts in a constitutionally adequate manner...." (J.S. App. 10a). Therefore, no review was necessary of prior years' appropriations by the legislature.

In concluding that the issue of the state legislature's appointment of further judges to the Superior Court was nonjusticiable, the Supreme Court was on absolutely firm ground. The Connecticut Constitution, Art. V § 2, Amend. XX § 2, places this duty in the exclusive province of the legislature. No court in any American jurisdiction, and under any state constitution or under the federal constitution, has ever ruled that the judicial branch of government can even reach the merits in a case that challenges the adequacy of the number of judges authorized and appropriated for by the legislative branch of government.

Finally, and even though never emphasized by the appellants at any

point in the proceedings until now, [7/] the Connecticut Supreme Court correctly held that the due process clause does not support appellants' claims regarding court congestion. The court relied on Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U.S. 151 (1931) to conclude that appellants had no rights at all to a civil jury trial in state court. See also, Boddie v. Connecticut, 401 U.S. 371, 382 (1971):

> We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of an individual....

Accord, Ad Hoc Committee, supra.

7/ It is not even addressed to this Court in the question presented.

CONCLUSION

The appeal should be dismissed, or in the alternative, the judgment of the Connecticut Supreme Court should be affirmed. If considered a petition for certiorari, the petition should be denied.

Respectfully Submitted,

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